Tan Kim Hai & Sons Enterprises Sdn Bhd & Ors v Tan Kim San & Sons Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D2-22-1067-1994
LOW HOP BING J
10 JULY 1996

Civil Procedure *— Cost — Plaintiff achieving reliefs in separate proceedings — Action withdrawn by consent — Interlocutory injunction obtained prior to withdrawal — Whether defendant entitled to cost — Whether inquiry should be ordered as to damages pursuant to undertaking to secure injunction.*

The parties in this action were members or companies controlled by members of one Tan family. The plaintiffs in this action claimed and sought to enforce contractual rights arising from agreements entered into with the defendants, together with other members and/or companies of the Tan family to resolve a previous dispute. The plaintiffs alleged that despite their having fulfilled obligations under the agreements to procure the sale to the defendants of nine lots of choice lands ('the lands') belonging to subsidiaries of Tan Cheong Leong and Sons Sdn Bhd ('TCLS'), the defendants were in breach of their cross-obligations, in particular the sale of 633,453 shares in TCLS by the first defendant to the third plaintiff and the sale of shares in a Singapore company known as Cairnhill Hotel Pte Ltd by the second defendant to the second plaintiff. Hence, the plaintiffs sought an order, inter alia, that the first defendant complete the sale of the said shares in TCLS to the third plaintiff and that the second defendant complete the sale of his shares in Cairnhill to the second plaintiff. On 7 February 1995, the plaintiffs obtained an interim injunction restraining, inter alia, dealings in the lands and in the TCLS shares to preserve the status quo pending trial. Related to TCLS, one Tan Kim Leng had pursuant to a winding petition sought the winding up of TCLS, with the first defendant appearing as a supporting contributory. The shareholders of Cairnhill Hotel Pte Ltd and the second plaintiff had previously filed two civil suits in the Singapore High Court ('the Singapore suits') seeking orders, inter alia, that the second defendant complete the alleged obligation to sell his Cairnhill shares. However, in settlement of the Singapore suits and the winding-up petition, on 28 November 1995, a consent judgment was recorded in the Singapore suits whereby the second defendant was ordered to transfer his Cairnhill shares to the second plaintiff, and on 20 December 1995, in relation to the said petition, it was agreed that the first defendant would sell the said shares in TCLS to Tan Kim Leng. In the upshot, it was the consensus of both parties that the present action had been rendered academic. By consent, the present action was withdrawn on 25 April 1996. In the event, two questions arose for the court's determination: (i) whether in the circumstances of the case, the plaintiffs were liable to pay cost to the defendants following the withdrawal; and (ii) arising from the

withdrawal, whether an inquiry as to damages should be ordered pursuant to the plaintiff's undertaking given on 7 February 1995 to secure the said injunction.

Held, order accordingly:

(1) It was not the law that a plaintiff who withdrew an action must as a matter of course pay costs of the action. The principle was that the court must assess the situation to see why the action was withdrawn. On the facts of the instant case, the discontinuance was not an acknowledgment of defeat (see p 339G–I); *Barretts & Baird (Wholesale) Ltd v IPCS* (NLJ) 16 December 1988 followed.

(2) It is trite law that an inquiry to assess damages ought only to be ordered if there was a finding that the injunction ought not to have been granted or where the plaintiff failed at the trial. In other words, an inquiry was only ordered where the plaintiff's case for an injunction or the plaintiff's suit had been defeated. Neither event had transpired in the instant case. Further, discontinuance by reason of the action becoming academic could not be equated with defeat or an acknowledgment of likely defeat. The defendants were therefore not entitled to damages as a matter of course (see p 340D–E).

(3) Since the withdrawal of this action was by consent of the parties, the court had become functus officio and it was not open to the defendants to ask the court to go into the merits of the case for the purpose of obtaining costs and damages (see p 340H).

(4) It was clear that withdrawal took place following the plaintiffs obtaining the benefit of the reliefs they sought herein as a result of settlements reached in the petition and the Singapore suits. This action was therefor rendered academic and was properly discontinued by consent of all the parties. In the circumstances, there was no finding that the plaintiffs' case was without merit or was likely to fail. The appropriate order to be made would be for each party to bear its own costs and that there should be no inquiry as to damages (see pp 340I and 341A–B).

Per curiam:

When dealing with a question of costs in the context of an action that was discontinued because it had become academic, the courts had declined to go into the merits of the action (see p 340G).

[Bahasa Malaysia summary

Pihak-pihak dalam tindakan ini adalah ahli-ahli atau syarikat-syarikat yang dikawal oleh ahli-ahli suatu keluarga Tan. Plaintif-plaintif dalam tindakan ini telah menuntut dan memohon untuk menguatkuasakan hak-hak kontraktual yang berbangkit dari perjanjian-perjanjian yang diikat dengan defendan-defendan bersama ahli-ahli dan/atau syarikat-syarikat lain keluarga Tan untuk menyelesaikan satu pertikaian dahulu.

Plaintif telah mendakwa bahawa meskipun mereka telah melaksanakan kewajipan-kewajipan di bawah perjanjian-perjanjian tersebut untuk mendapatkan penjualan kepada defendan-defendan sembilan lot tanah pilihan ('tanah tersebut') kepunyaan anak-anak syarikat Tan Cheong Leong & Sons Sdn Bhd ('TCLS'), defendan-defendan telah memungkiri kewajipan-kewajipan salingan mereka, khasnya penjualan 633,453 saham dalam TCLS oleh defendan pertama kepada plaintif ketiga dan penjualan saham-saham dalam sebuah syarikat Singapura yang dikenali sebagai Cairnhill Hotel Pte Ltd oleh defendan kedua kepada plaintif pertama. Oleh itu, plaintif-plaintif memohon satu perintah, antara lain, bahawa defendan pertama menghabiskan jualan saham-saham tersebut dalam TCLS kepada plaintif ketiga dan bahawa defendan kedua menghabiskan jualan saham-saham dalam Cairnhill kepada plaintif kedua. Pada 7 Februari 1995, plaintif-plaintif telah memperolehi satu injunksi sementara menegah, antara lain, pengurusan dalam tanah-tanah tersebut dan dalam saham-saham TCLS untuk mengekalkan status quo sementara perbicaraan. Berkenaan dengan TCLS, seorang yang dikenali sebagai Tan Kim Leng telah melalui suatu petisyen penggulungan memohon penggulungan TCLS, dengan defendan pertama menghadiri diri sebagai penyumbang sokongan. Para pemegang saham Cairnhill Hotel Pte Ltd dan plaintif kedua telah terlebih dahulua memfailkan dua guaman sivil di Mahkamah Tinggi Singapura ('guaman-guaman Singapura') memohon perintah-perintah, antara lain, bahawa defendan kedua menghabiskan kewajipan yang didakwakan untuk menjual saham-saham Cairnhillnya. Namun begitu, dalam penyelesaian guaman-guaman Singapura dan petisyen penggulungan tersebut, pada 28 November 1995, suatu penghakiman persetujuan telah dirakamkan dalam guaman-guaman Singapura tersebut di mana defendan kedua telah diarahkan untuk memindahmilikkan saham-saham Cairnhillnya kepada plaintif, dan pada 20 Disember 1995, mengenai petisyen tersebut, adalah dipersetujui bahawa defendan pertama akan menjual saham-saham tersebut dalam TCLS kepada Tan Kim Leng. Kesudahannya adalah menjadi persetujuan kedua-dua pihak bahawa tindakan sekarang telah menjadi akademik. Melalui persetujuan, tindakan sekarang telah ditarikbalik pada 25 April 1996. Dalam hal demikian, dua soalan timbul untuk diputuskan oleh mahkamah: (i) sama ada dalam hal keadaan kes, plaintif-plaintif adalah bertanggungan untuk membayar kos kepada defendan-defendan ekoran penarikan-balik tersebut; dan (ii) berbangkit dari penarikan-balik tersebut, sama ada suatu penyiasatan mengenai ganti rugi patut diperintahkan susulan dari akujanji plaintif yang telah diberikan pada 7 Februari 1995 untuk mendapatkan injunksi tesebut.

Diputuskan, perintah sewajarnya:

(1) Bukanlah menjadi undang-undang bahawa seseorang plaintif yang menarikbalik sesuatu tindakan semestinya membayar kos tindakan. Yang menjadi prinsip adalah bahawa mahkamah

mestilah menilai keadaan tersebut untuk melihat mengapa tindakan itu telah ditarikbalik. Atas fakta-fakta kes ini, pemberhentian tersebut bukanlah satu pengakuan kekalahan (lihat ms 339G–I); *Barretts & Baird (Wholesale) Ltd v IPCS* (NLJ) 16 December 1988 diikut.

(2) Adalah undang-undang mantap bahawa sesuatu penyiasatan untuk mentaksirkan ganti rugi patut hanya diperintahkan jika adanya kedapatan bahawa injunksi tersebut tidak seharusnya diberikan atau di mana plaintif telah gagal di perbicaraan. Dalam kata-kata lain, sesuatu penyiasatan hanya diperintahkan di mana kes plaintif untuk satu injunksi atau guaman plaintif telah dikalahkan. Kedua-dua hal tidak berlaku dalam tindakan ini. Selanjutnya, pemberhentian oleh sebab tindakan menjadi akademik tidak boleh disamakan dengan kekalahan atau suatu pengakuan akan kekalahan yang mungkin. Oleh itu, defendan-defendan tidak berhak kepada ganti rugi dengan semestinya (lihat ms 340D–E).

(3) Oleh sebab penarikan-balik tindakan ini adalah melalui persetujuan pihak-pihak, mahkamah telah functus officio dan adalah tidak terbuka kepada defendan-defendan untuk meminta mahkamah untuk menjerumus ke dalam merit-merit kes untuk tujuan mendapatkan kos dan ganti rugi (lihat ms 340H).

(4) Adalah jelas bahawa penarikan-balik berlaku ekoran daripada plaintif-plaintif mendapat manfaat relief-relief yang mereka pohonkan akibat penyelesaian yang dicapai dalam petisyen dan guaman-guaman Singapura. Oleh itu, tindakan ini telah menjadi akademik dan telah sewajarnya diberhentikan melalui persetujuan kesemua pihak. Dalam hal keadaan demikian, tidak ada kedapatan bahawa kes plaintif adalah tidak bermerit atau mungkin akan gagal. Perintah yang sewajarnya untuk dibuat adalah bagi setiap pihak menanggung kos-kos sendiri dan bahawa tiada penyiasatan tentang ganti rugi (lihat ms 340I dan 341A–B).

Per curiam:

Apabila mengendalikan suatu soalan kos dalam konteks sesuatu tindakan yang telah diberhentikan kerana ianya telah menjadi akademik, mahkamah-mahkamah telah enggan untuk membincangkan merit-merit tindakan (lihat ms 340G).]

Notes

For cases on cost, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 838–1088.

For cases on discontinuance and withdrawal, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1134–1140.

Cases referred to

Barretts & Baird (Wholesale) Ltd v IPCS (NLJ) 16 December 1988 (folld)

A *Hongkong & Shanghai Banking Corp v Timor Electric Cable & Wire Sdn Bhd & Ors* [1992] 1 MLJ 779 (refd)
JT Stratford & Son Ltd v Lindley & Ors [1969] 1 WLR 1547 (refd)
Ushers Brewery Ltd v PS King & Co (Finance) Ltd [1972] 1 Ch 148 (refd)

B *K Mohana Dass* (*Shook Lin & Bok*) for the plaintiff.
RR Sethu (*Joseph Yeo* with him) (*RR Sethu*) for the defendant.

Cur Adv Vult

C **Low Hop Bing J**:

Introduction

The parties herein agree that the two questions for the court's determination may be stated as follows:

D (i) in the circumstances of this case, are the plaintiffs liable to pay costs to the defendant following the withdrawal of the instant action, by consent, on 25 April 1996?

(ii) arising from the above withdrawal, should an inquiry as to damages be ordered pursuant to the plaintiffs' undertaking given on 7 February
E 1995 to secure the injunction granted by this court against the defendants?

Contention of the parties

It was contended for the plaintiffs that the respective answers to both
F the above questions are in the negative.

The defendants responded that upon the withdrawal of the present suit by the plaintiffs on 25 April 1996, the defendants are entitled to the costs of this suit as costs must follow the event. It was further submitted for the defendants that the injunction could have been dissolved in any event
G and hence damages should be paid in accordance with the undertaking.

Background facts

The parties to this action are members, or companies controlled by members, of the Tan family. So as to resolve a previous dispute, the
H parties, together with other members and/or companies of the Tan family, entered into a number of agreements ('the agreements') intending to achieve a settlement of family assets situated in Singapore and Malaysia.

Subsequently, disputes arose in the implementation of the agreements culminating in this action where the plaintiffs and the defendants accused
I the other of being in breach of the agreements.

The scope of the agreements may be described as achieving a corporate divorce by which factions of the Tan family would disentangle their interlocking or joint ownership of family assets in favour of a new arrangement with the rival factions having independent control of different assets.

By this action, the plaintiffs claimed and sought to enforce contractual rights arising from the agreements. The plaintiffs alleged that despite their having fulfilled obligations under the agreements to procure the sale to the defendants of nine lots of choice lands ('the lands') belonging to subsidiaries of Tan Cheong Leong and Sons Sdn Bhd ('TCLS'), the defendants were in breach of their cross-obligations, in particular:

(1) the sale of 633,453 shares in the Malaysian company namely, TCLS by the first defendant to the third plaintiff; and

(2) the sale of shares in the Singapore company known as Cairnhill Hotel Pte Ltd ('the Cairnhill shares') by the second defendant to the second plaintiff.

Further to their claims abovestated, the plaintiffs by their statement of claim filed herein (encl 1) sought the following reliefs:

(1) an order that the first defendant complete the sale of 633,453 of its shares in TCS to the third plaintiff within 14 days herein;

(2) an order that the second defendant complete the sale of his share in Cairnhill to the second plaintiff within 14 days within;

alternatively:

(3) an order that the global agreement and/or the settlement agreement be rescinded and that the first and third defendants re-transfer the respective lands to Hiap Lee (Cheong Leong & Sons) Brickmakers Sdn Bhd and Hiap Lee Construction Co Sdn Bhd; and

(4) costs.

So as to preserve the status quo pending trial, the plaintiffs sought and obtained on 7 February 1995 an interim injunction restraining, inter alia, dealings in the lands, and dealings in the TCLS shares which were to be sold by the second defendant to the third plaintiff. It is in relation to this injunction that the question of the inquiry as to damages arises.

Related proceedings

There are other proceedings which are relevant for the purposes of the matters which are now in issue. Firstly, Winding-Up Petition No D5–28–220–1995 in which one Tan Kim Seng sought the winding up of Tan Cheong Leong & Sons Sdn Bhd and in which the first defendant appeared as a supporting contributory. Secondly, Suits No 1991 and 1992 of 1994 commenced in the Singapore High Court by shareholders of Cairnhill Hotel Pte Ltd including the second plaintiff seeking orders, inter alia, that the second defendant complete the alleged obligation to sell his Cairnhill shares under the agreements. These two proceedings will be referred to as 'the petition' and 'the Singapore suits' respectively.

As a result of a settlement recorded in the petition and the Singapore suits, the following matters came to pass:

(1) on 28 November 1995 by way of a consent judgment recorded in the Singapore suits, the second defendant was ordered to transfer Cairnhill shares in his name to the second plaintiff; and

(2) on 20 December 1995, in the petition, it was agreed that the first defendant would sell 633,453 TCLS shares to Tan Kim Leng.

Why the plaintiffs are not liable for costs and damages

It is eminently clear from the above facts that the plaintiffs have, as a result of the settlement, achieved the reliefs that they had in the first place sought in this action. It is for this reason only, and not because of any lack of merit, that this action has been discontinued as is plainly stated in para 3 of the affidavit of Tan Kim Lim affirmed on 29 February 1996, encl 87. The defendants in their own affidavits also take the position that this action is no longer maintainable because of the settlement of the Singapore suits and the petition (see para 18 of encl 82). The consensus therefore is that this action has been rendered academic by supervening events. This is expressly admitted by the defendants in their solicitors' letter dated 2 January 1996 addressed to the plaintiffs' solicitors (encl 82, affidavit of Tan Kim San of 1 February 1996, exh C at p 23) in which the opening paragraph reads:

> KL High Court Suit No D2–22–1067–1992
>
> ... our clients instruct us that the above suits have become academic ...

The other significant feature which ought to be appreciated is that in the Singapore suits, judgment was entered by consent against the defendant therein, ie the second defendant in this action, in respect of the Cairnhill shares. Additionally, substantial costs were ordered in favour of the plaintiffs as shown by exh D to the affidavit of Tan Kim San affirmed on 12 March 1996 (encl 88). Apart from testifying to the merits of the plaintiffs' claim, in my considered view, as between the second plaintiff and the defendants, the judgment in the Singapore suits constitutes res judicata on the issue of the Cairnhill shares with the result that in respect of this action, the plaintiffs' claim against the defendants for the Cairnhill shares is valid and cannot be defended.

Harking back to the legal position, I am of the view that it is not the law that a plaintiff who withdraws an action must as a matter of course pay the costs of the action. Indeed, the principle is that the court must assess the situation to see why the action was withdrawn. In *Barretts & Baird (Wholesale) Ltd v IPCS* (NLJ) 16 December 1988, 357 Henry J observed as follows at p 358:

> Now in most cases of discontinuance that may well be the general rule because in most cases of discontinuance, the discontinuance is effectively a defeat or an acknowledgement of defeat or a likely defeat. But it is equally possible, and the plaintiffs assert it to be the situation in this case, that discontinuance reflects not defeat so much as that the matter has now become academic save for the question of costs. In those circumstances where the matter is effectively academic, the court should then look at the matter to see whether the general rule applies because I am satisfied that the general rule should only apply when the discontinuance can safely be equated with defeat or an acknowledgment of likely defeat.

On the facts as alluded to above, I hold the view that the discontinuance is not an acknowledgment of defeat. On the contrary, the plaintiffs are

withdrawing because of the defendants' capitulation in the Singapore suits and the agreement reached in the petition, as a result of which the plaintiffs are now in as strong a position as they would have been had they succeeded in this action.

As for the matter of damages on account of the injunction, I am of the view that the principle abovestated in respect of costs applies also to the question of damages. This may be seen from the decision in *Ushers Brewery Ltd v PS King & Co (Finance) Ltd* [1972] 1 Ch 148, where at p 154, Plowman J observed as follows:

> It is in my judgment established by the authorities that an inquiry as to damages will not be ordered in these cases until either the plaintiff has failed on the merits at the trial or it is established before trial that the injunction ought not to have been granted in the first instance.

It is trite law that an inquiry to assess damages ought only to be ordered if there is a finding that the injunction ought not to have been granted or when the plaintiff fails at the trial. In other words, an inquiry is only ordered where the plaintiffs' case for an injunction, or the plaintiff's suit has been defeated. Neither event has transpired in the instant case. Further, as reasoned by Henry J in *Baird*'s case, discontinuance by reason of the action becoming academic cannot be equated with defeat or an acknowledgment of likely defeat. The defendants are therefore not entitled to damages as a matter of course.

Hence, the approach in deciding whether the plaintiffs who have discontinued an action should pay costs or be liable on the undertaking as to damages is to see if the discontinuance is an adverse reflection on the merits of their case. This is clearly not so in the instant case.

It is common ground that the plaintiffs' discontinuance or withdrawal of the instant case was by reason of the action becoming academic, in which case it would be unfair and unjust to penalize the plaintiffs by an order as to costs or damages in the circumstances of this case. When dealing with a question of costs in the context of an action that is discontinued because it has become academic, the courts have declined to go into the merits of the action. This was the approach taken by Chong Siew Fai CJ (Sabah and Sarawak) in *Hongkong & Shanghai Banking Corp v Timor Electric Cable & Wire Sdn Bhd* [1992] 1 MLJ 779 (see also *JT Stratford & Son Ltd v Lindley & Ors* [1969] 1 WLR 1547 (CA)). Since the withdrawal of this action is by consent of the parties, the court has become functus officio and it is not open to the defendants to ask the court to go into the merits of the case for the purposes of obtaining costs and damages.

It is settled law that mere discontinuance of an action does not automatically render the plaintiffs liable for costs or damages, especially when the discontinuance is based on the ground that the action has been rendered academic as opposed to it being withdrawn in acknowledgment of defeat.

In this action, it is clear that withdrawal took place following the plaintiffs obtaining the benefit of the reliefs they sought herein as a result of settlements reached in the petition and the Singapore suits. This action

A is therefore rendered academic and was properly discontinued by consent of all the parties. In the circumstances, there is no finding that the plaintiff's case is without merit or is likely to fail. The appropriate order to be made would be for each party to bear its own costs and that there should be no inquiry as to damages.

B *Order accordingly.*

Reported by Yong Yuan Kea

C

D

E

F

G

H

I